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GSA/NARS

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9 April 1984

MEMORANDUM FOR: See Distribution

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FROM:

[redacted]

Legislation Division
Office of Legislative Liaison

SUBJECT:

Department of Justice Views on H.R. 3987,
the "National Archives and Records
Administration Act of 1983"

1. Attached for your information, review, and comment is the views letter of the Department of Justice on H.R. 3987 (copy also attached). The Office of Management and Budget has requested our views on this letter. As indicated in the opening paragraph, the Department of Justice opposes enactment of this bill, and some of the reasons for their opposition, which are spelled out in the subsequent paragraphs, are the same ones we have had. Unless I hear from you to the contrary, this office will respond that we have "no objection" to the position taken by the Department of Justice.

2. The Office of Management and Budget has requested our views not later than COB 11 April. Therefore, I would appreciate your informing me if you have any problems with our proposed response not later than noon, 10 April. Please feel free to make your comments by telephone [redacted] given the short response time.

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Attachment
As stated

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LEG/OLL: [redacted]:grf (6 April 1984)

98TH CONGRESS
1ST SESSION

H. R. 3987

To improve the preservation and management of Federal records, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 27, 1983

Mr. BROOKS (for himself and Mr. ENGLISH) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To improve the preservation and management of Federal records, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "National Archives and
- 4 Records Administration Act of 1983".

1 **TITLE I—ESTABLISHMENT OF AN INDEPENDENT**
2 **NATIONAL ARCHIVES AND RECORDS ADMIN-**
3 **ISTRATION**

4 **ESTABLISHMENT**

5 **SEC. 101.** Section 2102 of title 44, United States Code,
6 is amended to read as follows:

7 **“§ 2102. Establishment**

8 “There is established an independent establishment in
9 the executive branch of the Government to be known as the
10 National Archives and Records Administration. The Admin-
11 istration shall be administered under the supervision and di-
12 rection of the Archivist.”.

13 **ORGANIZATION AND GENERAL AUTHORITY**

14 **SEC. 102. (a)** Chapter 21 of title 44, United States
15 Code, is amended—

16 (1) by redesignating sections 2103 through 2114
17 as sections 2107 through 2118, respectively; and

18 (2) by inserting after section 2102 the following
19 new sections:

20 **“§ 2103. Officers**

21 “(a) The Archivist of the United States shall be appoint-
22 ed by the President by and with the advice and consent of the
23 Senate. The Archivist shall be appointed without regard to
24 political affiliations and solely on the basis of the professional

1 qualifications required to perform the duties and responsibil-
2 ities of the office of Archivist.

3 “(b) The Archivist shall be compensated at the rate pro-
4 vided for level III of the Executive Schedule under section
5 5314 of title 5.

6 “(c) There shall be in the Administration a Deputy Ar-
7 chivist of the United States, who shall be appointed by and
8 who shall serve at the pleasure of the Archivist. The Deputy
9 Archivist shall be established as a career reserved position in
10 the Senior Executive Service within the meaning of section
11 3132(a)(8) of title 5. The Deputy Archivist shall perform
12 such functions as the Archivist shall designate. During any
13 absence or disability of the Archivist, the Deputy Archivist
14 shall act as Archivist. In the event of a vacancy in the office
15 of the Archivist, the Deputy Archivist shall act as Archivist
16 until an Archivist is appointed under subsection (a).

17 **“§ 2104. Administrative provisions**

18 “(a) The Archivist shall prescribe such policies, stand-
19 ards, criteria, procedures, rules, and regulations as the Archi-
20 vist finds necessary or appropriate to carry out the functions
21 of the Administration. The head of each Federal agency shall
22 issue such orders and directives as may be necessary to con-
23 form the activities of the agency with the policies, standards,
24 criteria, procedures, rules, and regulations prescribed by the
25 Archivist.

1 “(b) Except as otherwise expressly provided by law, the
2 Archivist may delegate functions to designated officers and
3 employees of the Administration, and may authorize such
4 successive redelegations of such functions as the Archivist
5 may deem to be necessary or appropriate. A delegation of
6 functions by the Archivist shall not relieve the Archivist of
7 responsibility for the administration of such functions.

8 “(c) The Archivist is authorized to establish, maintain,
9 alter, or discontinue such regional, local, or other field offices
10 as the Archivist finds necessary or appropriate to perform the
11 functions of the Archivist or the Administration.

12 “(d) The Archivist shall cause a seal of office to be made
13 for the Administration and judicial notice shall be taken of
14 such seal.

15 “(e) Each Federal agency is required to furnish to the
16 Archivist, upon request, any information or other data which
17 the Archivist finds necessary to carry out the duties of the
18 Archivist.

19 “(f) The Archivist may establish advisory committees to
20 advise him with respect to any function of the Archivist or
21 the Administration. Members of any such committee shall
22 serve without compensation but shall be entitled to transpor-
23 tation expenses and per diem in lieu of subsistence in accord-
24 ance with section 5703 of title 5.

5

1 “(g) The Archivist shall advise and consult with inter-
2 ested Federal agencies with a view to obtaining their advice
3 and assistance in carrying out the purposes of this chapter.

4 “(h) If authorized by the Archivist, officers and employ-
5 ees of the Administration having investigatory functions are
6 empowered, while engaged in the performance of their duties
7 in conducting investigations, to administer oaths.

8 **“§ 2105. Personnel and services**

9 “(a) The Archivist is authorized to select, appoint,
10 employ, and fix the compensation of such officers and em-
11 ployees, pursuant to part III of title 5, as are necessary to
12 perform the functions of the Archivist and the Adminis-
13 tration.

14 “(b) The Archivist is authorized to obtain the services of
15 experts and consultants under section 3109 of title 5.

16 “(c) Notwithstanding the provisions of section 973 of
17 title 10 or any other provision of law, the Archivist, in carry-
18 ing out the functions of the Archivist or the Administration,
19 is authorized to utilize in the Administration the services of
20 officials, officers, and other personnel in other executive
21 agencies, including personnel of the armed services, with the
22 consent of the head of the agency concerned.

23 “(d) The Archivist is authorized to accept and utilize
24 voluntary and uncompensated services.

1 **“§ 2106. Reports to Congress**

2 **“The Archivist shall submit to the Congress, in January**
3 **of each year and at such other times as the Archivist finds**
4 **appropriate, a report concerning the administration of func-**
5 **tions of the Archivist and the Administration.”.**

6 **(b) Section 2102 of title 44, United States Code, is**
7 **amended—**

8 **(1) by designating the two indented paragraphs as**
9 **paragraphs (1) and (2), respectively;**

10 **(2) by striking out “sections 2103–2113 of this**
11 **title” in the matter preceding the first such paragraph**
12 **and inserting in lieu thereof “this chapter”;**

13 **(3) by striking out the period at the end and in-**
14 **serting in lieu thereof a semicolon; and**

15 **(4) by adding at the end thereof the following new**
16 **paragraphs:**

17 **“(3) ‘executive agency’ means any executive de-**
18 **partment or independent establishment in the executive**
19 **branch of the Government, including any wholly owned**
20 **Government corporation;**

21 **“(4) ‘Federal agency’ means any executive de-**
22 **partment, military department, Government corpora-**
23 **tion, Government-controlled corporation, or other es-**
24 **tablishment in the executive branch of the Government**
25 **(including the Executive Office of the President), any**
26 **independent regulatory agency, or any establishment in**

1 the legislative or judicial branch of the Government
2 (except the Senate and the House of Representatives);

3 “(5) ‘Archivist’ means the Archivist of the United
4 States appointed under section 2103; and

5 “(6) ‘Administration’ means the National Archives
6 and Records Administration established under section
7 2102.”.

8 (c)(1) The table of sections for chapter 21 of title 44,
9 United States Code, is amended to read as follows:

10 **“CHAPTER 21—NATIONAL ARCHIVES AND RECORDS**
11 **ADMINISTRATION**

“Sec.

“2101. Definitions.

“2102. Establishment.

“2103. Officers.

“2104. Administrative provisions.

“2105. Personnel and services.

“2106. Reports to Congress.

“2107. Acceptance of records for historical preservation.

“2108. Responsibility for custody, use, and withdrawal of records.

“2109. Preservation, arrangement, duplication, exhibition of records.

“2110. Servicing records.

“2111. Material accepted for deposit.

“2112. Presidential archival depository.

“2113. Depository for agreements between States.

“2114. Preservation of motion-picture films, still pictures, and sound recordings.

“2115. Reports; correction of violations.

“2116. Legal status of reproductions; official seal, fees for copies and reproductions.

“2117. Limitation on liability.

“2118. Records of Congress.”.

12 (2) The item relating to chapter 21 in the table of chap-
13 ters for title 44, United States Code, is amended to read as
14 follows:

“21. National Archives and Records Administration 2102”.

TRANSFER OF FUNCTIONS

1

2 **SEC. 103. (a)** All authorities and functions of the Ad-
3 ministrator of General Services specified in chapters 7, 15,
4 17, 21, 22, 23, 25, 29, 31, and 33 of title 44, United States
5 Code, are transferred to the Archivist of the United States
6 appointed under section 2104 of title 44, United States Code.

7 **(b)** The National Archives and Records Service of the
8 General Services Administration is transferred to the Nation-
9 al Archives and Records Administration.

10 **(c)** In the exercise of the functions transferred under this
11 Act, the Archivist shall have the same authority as had the
12 Administrator of General Services with respect to chapters 7,
13 15, 17, 21, 22, 23, 25, 29, 31, and 33 of title 44, United
14 States Code, and the actions of the Archivist shall have the
15 same force and effect as when exercised by such Administra-
16 tor.

17 **(d)** Prior to the appointment and confirmation of an indi-
18 vidual to serve as Archivist of the United States under sec-
19 tion 2103 of title 44, United States Code, the individual hold-
20 ing the office of Archivist of the United States on the day
21 before the effective date of this Act may serve as Archivist
22 under such section, and while so serving shall be compensat-
23 ed at the rate provided under subsection (b) of such section.

(b) The transfer pursuant to this title of full-time person-
nel (except special Government employees) and part-time
personnel holding permanent positions shall not cause any
such employees to be separated or reduced in grade or com-
pensation for one year after such transfer or after the effec-
tive date of this Act, whichever is later.

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1 under the same terms and conditions and to the same extent
2 that such proceeding could have been discontinued or modi-
3 fied if this Act had not been enacted.

4 (2) The Archivist is authorized to promulgate regula-
5 tions providing for the orderly transfer of proceedings contin-
6 ued under paragraph (1) from the General Services Adminis-
7 tration to the Administration.

8 (c) Except as provided in subsection (e)—

9 (1) the provisions of this Act shall not affect ac-
10 tions commenced prior to the effective date of this Act,
11 and

12 (2) in all such actions, proceedings shall be had,
13 appeals taken, and judgments rendered in the same
14 manner and effect as if this Act had not been enacted.

15 (d) No action or other proceeding lawfully commenced
16 by or against any officer of the United States acting in his or
17 her official capacity shall abate by reason of any transfer
18 under this Act. No cause of action by or against the General
19 Services Administration or by or against any officer thereof
20 in the official capacity of such officer shall abate by reason of
21 any transfer of functions under this Act.

22 (e) If, before the date on which this Act takes effect, the
23 General Services Administration or any officer thereof in the
24 official capacity of such officer, is a party to an action, and
25 under this Act any function in connection with such action is

1 transferred to the Archivist or any other official of the Ad-
2 ministration, then such action shall be continued with the Ar-
3 chivist or other appropriate official of the Administration sub-
4 stituted or added as a party.

5 (f) Orders and actions of the Archivist in the exercise of
6 functions transferred under this Act shall be subject to judi-
7 cial review to the same extent and in the same manner as if
8 such orders and actions had been by the individual holding
9 the office of Archivist of the United States on the day before
10 the effective date of this Act or the Administrator of General
11 Services in the exercise of such functions immediately pre-
12 ceding their transfer. Any statutory requirements relating to
13 notice, hearings, action upon the record, or administrative
14 review that apply to any function transferred by this Act
15 shall apply to the exercise of such function by the Archivist.

16 REFERENCE

17 SEC. 106. With respect to any functions transferred by
18 this Act and exercised after the effective date of this Act,
19 reference in any other Federal law to the office of the Archi-
20 vist of the United States as in existence on the date before
21 the effective date of this Act or the National Archives and
22 Records Service of the General Services Administration or
23 any office or officer thereof shall be deemed to refer to the
24 Archivist or the Administration.

1 CONFORMING AMENDMENTS

2 SEC. 107. (a)(1) Section 2103(4) of title 44, United
3 States Code, is amended by striking out "section 2107" and
4 inserting in lieu thereof "section 2111".

5 (2) Section 2108 of such title is amended by striking out
6 "section 2107" each place it appears and inserting in lieu
7 thereof "section 2111".

8 (b)(1) Chapters 7, 15, 17, 22, 23, 25, 29, 31, and 33 of
9 title 44, United States Code, are amended by striking out
10 "Administrator of General Services" and "General Services
11 Administration" wherever they appear and inserting in lieu
12 thereof "Archivist of the United States" and "National Ar-
13 chives and Records Administration", respectively.

14 (2) Chapter 21 of such title is further amended by strik-
15 ing out "Administrator of General Services" and "General
16 Services Administration" and inserting in lieu thereof "Ar-
17 chivist" and "Administration", respectively.

18 (c)(1) Section 101 of the Presidential Recordings and
19 Materials Preservation Act is amended—

20 (A) by striking out "section 2107" each place it
21 appears and inserting in lieu thereof "section 2111";

22 (B) by striking out "Administrator of General
23 Services" and inserting in lieu thereof "Archivist of
24 the United States": and

1 (C) by striking out "Administrator" each place it
2 appears and inserting in lieu thereof "Archivist".

3 (2) Section 102 of such Act is amended—

4 (A) by striking out "section 2107" and inserting
5 in lieu thereof "section 2111", and

6 (B) by striking out "Administrator" each place it
7 appears and inserting in lieu thereof "Archivist".

8 (3) Section 103 of such Act is amended by striking out
9 "Administrator" and inserting in lieu thereof "Archivist".

10 (4) Section 104 of such Act is amended by striking out
11 "Administrator" each place it appears and inserting in lieu
12 thereof "Archivist".

13 (d) Section 5314 of title 5, United States Code, is
14 amended by adding at the end thereof the following:

15 "ARCHIVIST OF THE UNITED STATES."

16 (e) The item relating to chapter 29 in the table of chap-
17 ters for title 44, United States Code, is amended to read as
18 follows:

"29. Records Management by Archivist of the United States..... 2901".

19 (f) Sections 141 through 144 of title 4, United States
20 Code, are amended by striking out "Administrator of General
21 Services" and "General Services Administration" wherever
22 they appear and inserting in lieu thereof "Archivist of the
23 United States" and "National Archives and Records Admin-
24 istration", respectively.

1 (g) Section 199a, title 25, United States Code, is
2 amended by striking out "Administrator of General Services"
3 wherever it appears and inserting in lieu thereof "Archivist
4 of the United States."

5 (h) Sections 106a, 106b, and 112 of title 1, United
6 States Code, are amended by striking out "Administrator of
7 General Services" wherever it appears and inserting in lieu
8 thereof "Archivist of the United States."

9 (i) Sections 6 and 11 through 13 of title 3, United
10 States Code, are amended by striking out "Administrator of
11 General Services" and "General Services Administration"
12 wherever they appear and inserting in lieu thereof "Archivist
13 of the United States," and "National Archives and Records
14 Administration", respectively.

15 (j) Subsections (b)(6) and (l)(1) of section 552a of title 5,
16 United States Code, are amended by striking out "Adminis-
17 trator of General Services" wherever it appears and inserting
18 in lieu thereof "Archivist of the United States."

19 (k) Section 2301 of title 44, United States Code, is
20 amended by striking out the second sentence thereof.

21 (l) Section 2501 of title 44, United States Code, is
22 amended by striking out the last sentence thereof.

23 (m) Section 2504(a) of title 44, United States Code, is
24 amended by striking out "the Administrator" from the last

1 sentence thereof and inserting in lieu thereof "the President
2 and the Congress."

3 **DEFINITIONS**

4 **SEC. 108.** For purposes of sections 103 through 106—

5 (1) the term "Archivist" means the Archivist of
6 the United States appointed under section 2104 of title
7 44, United States Code, as added by section 2 of this
8 Act; and

9 (2) the term "Administration" means the National
10 Archives and Records Administration established under
11 section 2103 of such title (as amended by section 2 of
12 this Act).

13 **EFFECTIVE DATE**

14 **SEC. 109.** The provisions of this title shall be effective
15 120 days after the date of enactment of this Act.

16 **TITLE II—ADMINISTRATIVE PROVISIONS**

17 **COPYING AND AUTHENTICATING CHARGES**

18 **SEC. 201.** Section 2116(c) of title 44, United States
19 Code (as redesignated by section 102(a)), is amended to read
20 as follows:

21 "(c) The Archivist may charge a fee set to recover the
22 costs for making or authenticating copies or reproductions of
23 materials transferred to his custody. The Administrator may
24 not charge for making or authenticating copies or reproduc-
25 tions of materials for official use by the United States Gov-

1 ernment unless appropriations available to the Archivist for
2 this purpose are insufficient to cover the cost of performing
3 the work. Fees shall be deposited to the credit of the appro-
4 priation against which charges have been made.”.

5 **NATIONAL ARCHIVES TRUST FUND BOARD**

6 **SEC. 202.** (a) Chapter 23 of title 44, United States
7 Code, is amended by striking out sections 2302 through 2305
8 and inserting in lieu thereof the following:

9 **“§ 2302. Authority of the Board; seal; services; transfers to**
10 **GSA; bylaws; rules; regulations**

11 **“In carrying out the purposes of this chapter, the Board**
12 **shall—**

13 **“(1) adopt an official seal, which shall be judicial-**
14 **ly noticed;**

15 **“(2) utilize on a reimbursable basis the services**
16 **and personnel of the National Archives and Records**
17 **Administration necessary (as determined by the Archi-**
18 **vist) to assist the Board in the administration of the**
19 **trust fund, and in the preparation and publication of**
20 **special works and collections of sources and prepara-**
21 **tion, duplication, editing, and release of historical pho-**
22 **tographic materials and sound recordings;**

23 **“(3) submit to the Congress an annual report of**
24 **the moneys, securities, and other personal property re-**
25 **ceived and held by it, and of its operations, which shall**

1 include a listing of the purposes for which funds are
2 transferred to the National Archives and Records Ad-
3 ministration for expenditure;

4 “(4) adopt bylaws, rules, and regulations neces-
5 sary for the administration of its functions under this
6 chapter.

7 **“§ 2303. Powers and obligations of the Board; liability of**
8 **members**

9 “Except as otherwise provided by this chapter, the
10 Board shall have all the usual powers and obligations of a
11 trustee with respect to property and funds administered by it,
12 but the members of the Board are not personally liable,
13 except for malfeasance.

14 **“§ 2304. Compensation of members; availability of trust**
15 **funds for expenses of the Board**

16 “Compensation may not be paid to the members of the
17 Board for their services as members. Costs incurred by the
18 Board in carrying out its duties under this chapter, including
19 the obligations necessarily incurred by the members of the
20 Board in the performance of their duties, shall be paid by the
21 Archivist of the United States from trust funds available to
22 the Board for this purpose. The Board, by resolution may
23 authorize the transfer of funds (including the principal or in-
24 terest of a gift or request) to the National Archives and
25 Records Administration to be expended on an archival or

1 records activity approved by the Board or to accomplish the
2 purpose of a gift or bequest. Unless otherwise required by the
3 instrument of gift or bequest, no expenditure shall be ap-
4 proved or made toward an object or purposes for which ap-
5 propriated funds could not be expended.

6 **"§ 2305. Acceptance of gifts**

7 "The Board may solicit and accept gifts or bequests of
8 money or other property, for the benefit of or in connection
9 with the national archival and records activities administered
10 by the General Services Administration. Moneys that are for
11 deposit into the trust fund shall be deposited within 5 work-
12 ing days of the receipt thereof."

13 (b) Section 2307 of title 44, United States Code, is
14 amended to read as follows:

15 **"§ 2307. Trust fund account; disbursements; sales of publi-**
16 **cations and releases**

17 "The income from trust funds held by the Board and the
18 proceeds from the sale of securities and other personal prop-
19 erty, as and when collected, shall be covered into the Treas-
20 ury of the United States in a trust fund account to be known
21 as the National Archives Trust Fund, subject to disbursement
22 on the basis of certified vouchers of the Archivist of the
23 United States (or his designee) for activities approved by the
24 Board and in the interest of the national archival and records
25 activities administered by the National Archives and Records

1 Administration, including but not restricted to the prepara-
2 tion and publication of special works, and collections of
3 sources and the preparation, duplication, editing, and release
4 of historical photographic materials and sound recordings.
5 The Archivist may sell publications and releases authorized
6 by this section and paid for out of the income derived from
7 trust funds at a price which will cover their cost, and moneys
8 received from these sales shall be paid into, administered, and
9 expended as part of the National Archives Trust Fund.”.

10 AUTHORITY TO LITIGATE

11 SEC. 203. (a) Section 2905 of title 44, United States
12 Code, is amended by adding at the end thereof the following
13 new sentence: “In any case in which the head of the agency
14 fails to initiate an action for such recovery or other redress
15 within a reasonable period of time after being notified of any
16 such unlawful action, the Archivist of the United States may,
17 subject to section 518 of title 28 (relating to litigation before
18 the Supreme Court), designate attorneys to initiate and
19 appear for and represent the Archivist in such an action; and
20 the Archivist shall report the circumstances of any such fail-
21 ure by the head of the agency to the appropriate committees
22 of the Congress.”.

23 (b) Section 3106 of title 44, United States Code, is
24 amended by adding at the end thereof the following new sen-
25 tence: “In any case in which the head of the agency fails to

1 initiate an action for such recovery or other redress within a
2 reasonable period of time after being notified of any such un-
3 lawful action, the Archivist of the United States may, subject
4 to section 518 of title 28 (relating to litigation before the
5 Supreme Court), designate attorneys to initiate and appear
6 for and represent the Archivist in such an action; and the
7 Archivist shall report the circumstances of any such failure
8 by the head of the agency to the appropriate committees of
9 the Congress.”.

10 INSPECTION OF RECORDS

11 SEC. 204. Section 3301 of title 44, United States Code,
12 is amended—

13 (1) by inserting “(a)” before “As used in this
14 chapter,”;

15 (2) by inserting “, as determined by the Archivist
16 of the United States,” after “public business and pre-
17 served or”; and

18 (3) by adding at the end thereof the following new
19 subsection:

20 “(b) The Archivist of the United States shall, by regula-
21 tion, establish detailed criteria under which material shall be
22 examined to determine if it is a record as defined under sub-
23 section (a) and such regulation. The Archivist may have
24 access, to determine compliance with such subsection and

22

1 such regulations, to any material made or received by an
2 agency of the United States Government.”.

3

PUBLIC NOTICE

4 **SEC. 205.** Section 3303a(a) of title 44, United States
5 Code, is amended by inserting “, after publication of notice in
6 the Federal Register and an opportunity for interested per-
7 sons to submit comment thereon” immediately after “may”
8 in the second sentence thereof.

○

Big File

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This presents the views of the Department of Justice on H.R. 3987, a bill "To improve the preservation and management of federal records and for other purposes." The Department of Justice opposes the enactment of this legislation.

H.R. 3987 would establish an independent entity, the National Archives and Record Administration under the supervision and direction of the Archivist of the United States, a Presidential appointee. The bill would provide the National Archives with greater powers and functions than those presently retained under the General Services Administration, (GSA) the agency currently responsible for its management and administration. H.R. 3987 would also amend various statutes pertaining to the Archives, in order to conform with the proposed establishment of the Archives Administration.

We are concerned about certain proposed amendments to 44 U.S.C. §§2905 and 3106 of the Federal Records Act, which would expand the enforcement authority of the Archivist and would provide for the Archivist independently to initiate suit for the retrieval of documents that have been wrongfully removed from the custody of a federal agency, and a proposed amendment to 44 U.S.C. §3301 of the Records Disposal Act, which would provide for the inspection of agency records by the Archivist to determine whether records are subject to the records retention requirements of the Records Disposal Act. Although we perceive no direct conflict with the Freedom of Information Act, 5 U.S.C. §552, we oppose both enactment of §203 of the bill, which would amend 44 U.S.C. §§2905 and 3106, and §204 of the bill, which would amend 44 U.S.C. §3301.

We believe that the existing statutes governing records retention and management provide adequate administrative remedies, pursuant to 44 U.S.C. §§2905 and 3106, for violations of the Federal Records Act, and that the unprecedented establishment of the Archivist's right to designate attorneys, under proposed §203, to represent the Archivist in a retrieval action would be unnecessary

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and unwarranted. Under existing law, when an agency determines that records have been improperly removed from its custody, the agency head, the Administrator of GSA and the Attorney General must make a determination whether to initiate suit to retrieve the documents. See 44 U.S.C. §§2905 and 3106.

The Department is concerned that the proposed amendments would undermine this discretionary exercise of authority by the Attorney General on whether to initiate a lawsuit to retrieve wrongfully removed documents. Further, the amendments would clearly undercut the agency's own determination on whether a retrieval action for documents wrongfully removed from its custody would be justified in a particular instance. In this regard, the bill's reference to 28 U.S.C. §518 as purported authority for such litigation seems curious, to say the least, inasmuch as that statute speaks to the primacy of the Attorney General's litigation authority.

The Archivist should not be given litigation authority. Centralization of litigation authority in the Attorney General was first established in 1870 when the Department of Justice was created. Congress has identified the legal officers who are to protect the rights of the government under the records management and disposal laws codified at chapters 21, 29, 31 and 33 of Title 44 of the United States Code, i.e., the Attorney General and the Department of Justice. Sutherland v. International Insurance Co., 43 F.2d 969 (2d Cir.), cert. denied, 282 U.S. 890 (1930). Such centralization furthers the important policy goals of ensuring that the government speaks with one voice, ensures consideration of the potential impact of litigation upon the government as a whole, and facilitates presidential supervision over Executive Branch policies implicated in litigation. Section 203 seriously impairs these goals.

The Department has serious reservations about §204 of the bill, which would amend 44 U.S.C. §3301, pertaining to the determination of whether a record is subject to the stringent records retention requirements of the Records Disposal Act, 44 U.S.C. §3301, et seq. Essentially, the proposed provision would permit the Archivist to overrule determinations made by an agency head on whether an agency record comes within the purview of the Act. We fear that such a procedure could result in inaccurate determinations on whether documents are subject to the statute. The agency is much more qualified and able to assess the nature of the documents within its custody than the Archivist. We believe that each agency should make its own determinations, based on its expertise and familiarity with

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documents within its custody or possession and under general government-wide guidelines governing such decisions, as to whether its documents are subject to the requirements of the Disposal Act. Under existing law, there are adequate statutory provisions and departmental regulations issued thereunder to achieve the purposes of that Act.

It should be noted that section 204 of H.R. 3987 appears to neutralize 44 U.S.C. §2906(2). Specifically, 44 U.S.C. §2906(2) provides that "Records, the use of which is restricted by law or for reasons of national security or the public interest, shall be inspected, in accordance with regulations promulgated by the Administration, subject to the approval of the head of the agency concerned or of the President." The proposed amendment to 44 U.S.C. §3301 would be in conflict with 44 U.S.C. §2906 and would appear to eliminate the discretionary authority of the agency head or the President to limit access to certain records and would directly conflict with Executive Order 12065, "National Security Information" and Executive Order 12356 (effective date August 1, 1982), regarding access to classified National Security Information. Finally, recent experience has shown that National Archives employees often do not have current full-field investigations or appropriate security clearances necessary to gain access to the various levels of National Security Information or Sensitive Compartmental Information. To permit unrestricted access to sensitive and/or Classified National Security Information could compromise ongoing investigations, reveal the identities of informants, endanger the lives and safety of Department employees and seriously impede the mission of the Department of Justice and possibly endanger national security.

Section 201 and section 102 of H.R. 3987 would broaden the responsibilities and authority of the Archivist beyond those currently held by the Administrator of the GSA. These proposals would, at the minimum, confuse the question as to whether the Archivist can have access to records of the Federal Bureau of Investigation over the objection or without the approval of the Director. The Department is concerned that such language might give Archivist personnel unrestricted access to classified information, informant files, information relating to pending investigations, Foreign Intelligence Surveillance Act records, Title III information, Federal grand jury matters, or tax information provided to the FBI pursuant to 26 U.S.C. §6103.

Additionally, section 102 authorizes the general promulgation of regulations by the National Archives and Record Service (NARS). This section provides that each agency must adopt such orders and

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directives as necessary to conform its activities to the NARS regulations. These provisions would make agencies completely subject to the authority of NARS and would make the Archivist the sole arbiter of any conflict between NARS and an agency. We find this provision to be particularly troublesome.

The Department of Justice recommends against enactment of this legislation.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General